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In the Supreme Court of the United States

October Term, 1982

D. L. ORDERS, W. R. WILKINSON, JACKIE PARMITER, WARNER C. USELTON, JR., JACK PESGROVE, HAROLD WALLACE, HARVEY JENKINS, FRED E. PERSON, JR., PRESTON LEE DUNN, CHARLEY JONES, JOHN W. BLANTON, FOR THEMSELVES AND ALL OTHER NON-MINORITY EMPLOYEES OF THE MEMPHIS FIRE DEPARTMENT, SIMILARLY SITUATED,
Petitioners,

vs.

CARL W. STOTTS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, FRED JONES AND MEMPHIS FIRE DEPARTMENT, ROBERT W. WALKER, CITY OF MEMPHIS AND JOSEPH SABATINI,
Respondents.

BRIEF OF RESPONDENTS, MEMPHIS FIRE DEPARTMENT, ROBERT W. WALKER, CITY OF MEMPHIS AND JOSEPH SABATINI, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals properly determine that the District Court had not abused its discretion in denying Petitioners' request to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure?

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STATEMENT OF THE CASE

On February 16, 1977, Carl W. Stotts, an employee of the Memphis Fire Department, filed a class action suit pursuant to Section 706(f)(1) of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000 e-5(f)(1), 42 U.S.C. §1981 and 42 U.S.C. §1983, challenging the hiring

and promotion policies of the Memphis Fire Department. On May 4, 1978, the United States District Court for the Western District of Tennessee certified the case as a class action, defining the class as:

> all black employees of the Memphis Fire Department from March 24, 1972, until the present, all those black employees who will be employed there in the future, and all black persons who have been denied employment with the Memphis Fire Department since March 24, 1972.

On the same date, the Court denied a motion to intervene filed on behalf of a group of black employees of the Memphis Fire Department.

On June 19, 1979, Fred L. Jones filed an individual action against the Memphis Fire Department alleging that he had been denied a promotion on August 30, 1976, due to racial discrimination. On September 18, 1979, that action was consolidated with the Stotts class action, because of the common issues of law and fact.

During the pendency of this action, extensive pretrial activity took place. Interrogatories, motions to compel discovery, motions to dismiss and for summary judgment were filed. Some thirteen (13) depositions were taken. An application for a temporary restraining order and preliminary injunction were filed. On December 5, 1979, pursuant to Plaintiffs' motion for temporary restraining order and preliminary injunction, the District Court granted a temporary restraining order enjoining promotions in the Fire Prevention Bureau of the Memphis Fire Department.

Trial was set on six (6) different occasions for the following dates: August 30, 1978, May 7, 1979, October 9, 1979, November 14, 1979, February 27, 1980 and June 25,

1980. Pursuant to these trial settings, a joint pre-trial order was approved by the District Court and entered on September 17, 1979.

Additionally, the parties engaged in extensive settlement negotiations through the course of this litigation, and on April 25, 1980, the parties presented to the District Court a proposed Consent Decree resolving the dispute. At that time, the Court gave its preliminary approval to the Decree. Notices of the proposed Decree were posted in all firehouses for a period of fifteen (15) days, with copies being available to whomever wanted them. During this fifteen (15) day period, class members were provided the opportunity to file written objections to the Decree with the Clerk's office.

On May 16, 1980, the District Court met to determine if any objections had been received concerning the proposed Consent Decree. The Court was advised at that time that no objections had been made. However, on May 12, 1980, over three (3) years after the filing of the lawsuit, a motion to intervene as Defendants and Cross-Plaintiffs was filed on behalf of eleven (11) non-minority employees of the Memphis Fire Department, Petitioners herein.

On May 16, 1980, the District Court heard arguments concerning the motion to intervene and denied Petitioners' motion. At that time, the Court approved and entered the proposed Consent Decree without objection by the Petitioners. Subsequently, on May 23, 1980, the Court entered an Order more fully setting forth its reasons for denying the motion for intervention.

On June 6, 1980, a notice of appeal was filed on behalf of the eleven (11) non-minority employees of the Fire Department. On this same date, the above employees

also filed a motion for stay pending the appeal which was denied by the Court by its Order dated June 9, 1980.

On May 7, 1982, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court, finding that the lower Court had not abused its discretion in ruling that the motion to intervene filed by the non-minority firemen was untimely. *Stotts v. Memphis Fire Dept.*, 679 F.2d 579 (6th Cir. 1982). Petitioners herein now seek a review of that decision.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The decision below is fully consistent with the well-established legal principles governing intervention and does not evidence a conflict among the Court of Appeals or a departure from the rulings of this Court.

ARGUMENT

Petitioners do not assert that the decision of the Sixth Circuit creates a conflict among the Circuits regarding the standards to be applied by a district court in determining whether intervention should be permitted. Rather, Petitioners request this Court to review the opinion below for the purposes of more clearly defining the line of demarcation between permissible and impermissible affirmative action plans and of establishing a new rule governing intervention in employment discrimination cases. The decision below, however, does not present the appropriate basis for consideration of these issues.

Petitioners contend that the Sixth Circuit's denial of their application for intervention prior to the judicial ap-

proval of a consent decree necessitates further explanation by this Court regarding permissible affirmative action plans under *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). This issue is not before the Court. In *Weber*, the Court explicitly confined its decision to a very narrow issue: the voluntary adoption of affirmative action plans by private parties. Judicially approved or mandated affirmative action plans, as present herein, were not a subject of the Court's opinion. Thus, Petitioners' attempt to seek review of the decision below, based upon *Weber*, is in error.

Moreover, even if the Sixth Circuit decision denying intervention can be interpreted as approving a voluntary affirmative action plan, the terms of the Consent Decree questioned by Petitioners do not deviate from the guidelines enunciated in *Weber* relating to permissible affirmative action plans. Petitioners contend that the affirmative action provisions of the consent decree "unnecessarily trammels the interests of white employees" and, therefore, is impermissible under *Weber*. Although Petitioners conveniently refer to the oft-cited language in *Weber* and request clarification, Petitioners fail to acknowledge the subsequent language of the Court pertaining to the operation of the judicially approved Kaiser program. After defining the bounds over which a permissible affirmative action plan cannot transgress, the Court in *Weber* examined the plan before it and found it to be within the allowable confines, stating:

> The plan does not require the discharge of white workers and their replacement with new black hirees. . . . Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. (citations omitted).

Id. at 208.

Applying the Court's reasoning to the case at hand, it is clear that the provisions of the Consent Decree, even if considered a voluntary affirmative action plan and subject to *Weber*, are permissible. The provisions to which the Petitioners object (and to which their attempts of intervention were directed) provide that the Respondents would adopt the goal of promoting black applicants to positions within the Fire Department in proportion to their representation in the qualified applicant pool, but at minimum, a goal of twenty percent (20%) minority promotions is sought to be attained. However, the goals are not rigid quotas as the number of blacks qualified for a particular classification is recognized as a relevant factor in measuring compliance, and the Decree does not require the promotion of unqualified or less-qualified over more qualified employees (Section V, Goals, ¶8(a), Petitioners' App. 52-53). As evidenced by the express language of the Decree, the affirmative action provisions do not require the discharge or demotion of white employees and their replacement with new black promotees. Nor does the Decree create an absolute bar to the advancement of white employees. Thus, the affirmative action provisions of the Consent Decree do not evidence a conflict with this Court's opinion in *Weber* or the necessity for further explanation of that decision.

Petitioners' second basis for review is equally without merit. Petitioners would have the Court formulate a new rule providing non-minority employees with an absolute right to intervene in any employment discrimination litigation involving potential class-wide relief. Respondents submit that Petitioners' request is unnecessary as the long-established law governing intervention is well-founded and was properly applied by the Court below.

The undisguised issue before the Court is reduced to whether the District Court abused its discretion in deny-

ing Petitioners' request to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure. This issue was presented to the Sixth Circuit which held that the lower court properly acted within its discretion. Respondents submit that the question of possible abuse of discretion in denying intervention is not of such special or overriding importance to warrant review.

This Court has clearly established that a crucial factor in determining intervention under Rule 24 is the timeliness of the party's request for intervention. *NAACP v. New York*, 413 U.S. 345 (1973). There, the Court held: "Timeliness is to be determined from all circumstances. And to be decided by the court in its exercise of sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *Id.* at 366. The courts below followed this Court's teaching in *NAACP* in reaching their conclusions that Petitioners' application for intervention was untimely. Furthermore, the decisions do not suggest that the District Court abused the discretion afforded it under the Federal Rules.

In the decision below, the Sixth Circuit examined five (5) factors in reaching its conclusion that Petitioners' application for intervention was untimely, including: (1) the purpose for which intervention was sought, (2) the length of time preceding the application for intervention during which the proposed intervenors knew, or reasonably should have known, of their interest in the case, (3) the prejudice to the original parties due to the proposed intervenors' failure to apply properly for intervention, (4) the existence of unusual circumstances militating against or in favor of intervention, and (5) the point to which the suit had progressed. *Stotts v. Memphis Fire Dept.*, 679 F.2d at 582. In applying the known facts to the above enumerated factors, the Court properly determined that

the District Court did not abuse its discretion in holding that Petitioners' application for intervention was untimely. Thus, review of the lower court's ruling in this case is not warranted, and the facts in this case, as presented by Petitioners, do not suggest that an "absolute right" of intervention in employment cases is needed.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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